No. 10-792

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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GRANT M. WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,
Petitioners,

v.

MONSANTO COMPANY PENSION PLAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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February 14, 2010

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[See Inside Cover for Continuation of Caption]

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GLYNN DAVIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Petitioners,

v.

SOLUTIA INCORPORATED EMPLOYEES PENSION PLAN, *et al.*,

Respondents.

FRED DONALDSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Petitioners,

v.

PHARMACIA CASH BALANCE PENSION PLAN, *et al.*,

Respondents.

QUESTION PRESENTED

Whether credits to an ERISA plan's hypothetical account that add no new value to a participant's "accrued benefit," but merely restore an early retirement discount, are "benefit accruals" within the meaning of ERISA § 204(b)(1)H)(i)?

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

Pharmacia & Upjohn LLC and Pharmacia Corporation are parent corporations of respondent Pharmacia & Upjohn Company LLC. Pfizer Inc. is a parent corporation of respondent Pharmacia Corporation. Pfizer Inc. owns more than 10% of the publicly held stock of respondents Pharmacia & Upjohn Company LLC and Pharmacia Corporation.

Respondent Monsanto Company has no parent corporation and no other publicly held corporation owns 10% or more of its stock.

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STATUTES

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BRIEF IN OPPOSITION

When the Monsanto Company converted its prior pension plan to a cash balance plan, it provided certain enhancements to participants' retirement benefits. Under the previous plan, most participants could not receive benefits until age 65, and no one could receive them before age 55. Under the redesigned plan, participants were given the option to receive their benefits at any age. Full benefits were made available to everyone at age 55. Participants could also choose to take their benefits before age 55, in which case the benefits were discounted by 8.5% per year for each year the participant was younger than 55 to reflect an earlier payout. At the time of the conversion, participants were told that they would have this new discounted early retirement option in the revamped plan. Participants younger than age 55 were told that their hypothetical account balance for benefits earned under the prior plan would reflect the discount, and that the 8.5% per year discount would be restored with a corresponding 8.5% credit each year they chose not to take a distribution of their benefits, until they reached age 55, when their full benefit was payable and the discount eliminated.

Petitioners sued, claiming that this arrangement violates ERISA's prohibition against age discrimination because the 8.5% credits stop at age 55. The Seventh Circuit rejected that argument, concluding that ERISA's prohibition against age discrimination is not implicated by a credit to a cash balance account that only restores a discount related to a discounted early retirement option. Contrary to petitioners' suggestion, that ruling does not conflict with *Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), *Register* v. *PNC Financial Services Group*,

Inc., 477 F.3d 56 (3d Cir. 2007), *Drutis* v. *Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007), or *Hurlic* v. *Southern California Gas Co.*, 539 F.3d 1024 (9th Cir. 2008). In none of those cases did the courts discuss credits that operate only in connection with an early retirement option, or hold that ceasing any such credit at the point when the discount has been fully restored and full benefits are available—here, age 55—violates ERISA.

This Court should deny review because there is no split of authority and because petitioners present no claim of general significance. Their claims are based on a unique set of facts concerning how Monsanto preserved and enhanced the accrued benefits under the prior plan in converting to a cash balance plan design. The Seventh Circuit rightly rejected their claims, and nothing in the court's decision merits this Court's review.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Effective January 1, 1997, the Monsanto Company ("Old Monsanto") restructured its existing pension program, converting it to a single plan with a cash balance plan design. As a result of corporate restructuring, Old Monsanto's plan later became the three plans at issue in this case: the Monsanto Company Pension Plan, the Pharmacia Cash Balance Pension Plan, and the Solutia Inc. Employees' Pension Plan. The relevant provisions of each plan are identical.

Like other defined benefit plans, cash balance plans specify a promised benefit. But they do so in the form of a hypothetical "account" that reflects the benefit promised to each employee. This easily understood

account balance shows the benefit currently available to the participant. However, cash balance plans create no actual separate account for individual employees, the way 401(k) plans do. Instead, all plan "assets are held in trust for all participants, and the employer is responsible for ensuring that the assets are sufficient to pay the promised benefits." Pet. App. 2a-3a.

Old Monsanto's cash balance plan created two hypothetical accounts for each participant: a Cash Balance Account for new benefits that participants would earn going forward, and a Prior Plan Account for participants' already-earned benefits. "Petitioners are not challenging any aspect of the Plan's Cash Balance Account." Pet. 6.

The Prior Plan Account preserved the accrued benefits that participants had already earned as of the date of conversion, but did so in a present value, lump sum account format that made them easier to grasp. The accrued benefit is defined under ERISA as the "annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). Accordingly, in the prior plans, benefits were expressed to participants as a monthly annuity that a participant would receive when the participant reached age 65, the normal retirement age. The Prior Plan Account in the new plan preserved this accrued benefit, but expressed it as a lump sum amount that participants could take all at once. Because new benefits earned in the Cash Balance Account would also be presented as a current lump sum, converting the Prior Plan Account benefits to the lump-sum format made it easier for participants to calculate and understand the total benefits they had earned, and that were available to them at any given point in time.

Under the prior plans, some participants could qualify for full, undiscounted benefits before age 65, but no participant could receive any benefits before age 55. Under the new plan, all participants were credited with their full age-65 accrued benefit at age 55. All participants also were given the right to take a distribution of their benefits even before 55, but in that case the amount of their benefits would be discounted to reflect the earlier payment. The new option to take benefits before age 55 functioned like a discounted early retirement benefit. A participant electing to receive benefits under this early retirement option would have his benefit discounted by 8.5% for each year the participant was younger than age 55, and the Prior Plan Account balance would reflect that discounted amount.

Old Monsanto calculated the initial balance of the Prior Plan Account first by converting the already-earned monthly annuity (collectible at age 65 under the old plan) into a lump sum. That lump sum was then treated as fully payable to the participant at age 55. For participants age 55 or older, the full lump sum amount was the initial balance depicted in the Prior Plan Account on the date of conversion because that amount was immediately available to them as of the date of conversion. For participants younger than 55, that lump sum balance was shown to them discounted at a rate of 8.5% per year for each year the employee was younger than 55. The resulting balance reflected the amount of already-earned benefits immediately available to them as of the date of conversion under the new discounted early retirement option. If a participant did not take benefits before age 55, no discount was ever actually applied. Petitioners have never challenged the

lawfulness of the calculation of the initial balances credited to each participant's Prior Plan Account.

After the conversion, the Prior Plan Account balances for participants under age 55 at conversion increased each year by 8.5% credits until age 55, by which time the early retirement discount was reversed and their full accrued benefit was restored. For those who were 55 years old on the date of conversion, no 8.5% credits were added to their Prior Plan Accounts at any time because the early retirement discount had never applied.

The 8.5% discount and corresponding credits were explained to participants in detail before the conversion date. Various communications to participants specifically described that the 8.5% discount applied to the initial Prior Plan Account balances of employees younger than 55, and that the corresponding 8.5% credits would be applied only until participants reached age 55 because, by age 55, the discounts would be fully restored. The communications "described the 8.5% discount as an early retirement benefit and the 8.5% interest credits as necessary to restore the full previously accrued benefit to" participants. Pet. App. 5a.

Going forward from the conversion date, all Prior Plan Accounts of those who continued working increased by an annual 4% "pay credit." These 4% pay credits continued without regard to age so long as the participant remained with the company.

B. Petitioners' Claims

More than seven years after the conversion to the new plan, petitioners filed their claims against the successsors to the Old Monsanto plan. As relevant here, petitioners claimed that the plan's discontinuation of the 8.5% credits at age 55 violates

ERISA, which prohibits defined benefit plans from reducing "the rate of an employee's benefit accrual ... because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i).

C. The Lower Court Rulings

After certifying three identical classes (one for each plan successor), the district court entered summary judgment for the respondents. The court considered the "context and history" surrounding the 8.5% credits in the plans, including "other portions of the Plan and ... pre-conversion materials distributed to participants and the SPD [Summary Plan Description]." Pet. App. 28a. In light of the clear function of the 8.5% credits, the court ruled that the credits are not "benefit accruals" and do not cease "because of the attainment of any age," as petitioners claimed. *Id.* at 29a-39a.

The court of appeals affirmed. Noting that "ERISA does not define the phrase, 'benefit accrual,'" the Seventh Circuit first looked to its own previous treatment of the phrase in *Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006). Pet. App. 7a. The Seventh Circuit rejected petitioners' argument that *Cooper* "adopted a bright-line rule that any credit to a participant's cash balance account amounts to benefit accrual." Pet. App. 8a. Instead, the Seventh Circuit concluded that if credits add to the amount in a participant's hypothetical account without affecting the amount of a participant's "accrued benefit at retirement," then such "additions" are not "benefit accruals." *Id.* at 10a.

The Seventh Circuit recognized that the 8.5% credits at issue here are additions to a participant's Prior Plan Account that do not increase the accrued benefit at retirement. The court of appeals, employing

an example of a hypothetical employee who was 50 years old at the time the prior plan was converted to the cash balance plan, explained how the 8.5% credits added to the employee's Prior Plan Account until age 55 have no effect on the amount of the employee's accrued benefit. The accrued benefit the employee had earned on the date of conversion and was entitled to at age 55 (in the example, $125,000 at age 55) stays the same year after year, despite the 8.5% credit being added to the employee's Prior Plan Account each year until age 55. Pet. App. 10a-11a."Viewed as the increase in her accrued benefit at normal retirement age, the hypothetical employee's rate of benefit accrual is zero, both before and after reaching age 55." *Id.* at 11a. Ceasing the 8.5% credits at age 55, then, does not violate ERISA.

The court of appeals further explained that the 8.5% credits do not add to a participant's accrued benefit because they merely "credit[] back th[e] discount" applied at conversion. Pet. App. 14a. Petitioners had claimed that the 8.5% credits did not merely restore the 8.5% discount, but the mathematics are clear, and the court of appeals thus rejected that argument as "spurious." *Id.* at 14a. To rule as petitioners had urged "would treat all discounted early retirement programs as violations" of ERISA. *Id.* at 12a. The Eighth Circuit had previously rejected an age discrimination claim brought under ERISA against a plan with an early retirement discount feature, and the Seventh Circuit found no distinction between that case and this one. *Id.* at 12a-13a (discussing *Atkins* v. *Nw. Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992)).

Finally, the Seventh Circuit observed that the 4% pay credits have no effect on the analysis. The 4% pay credits increase the "value of an employee's ...

accrued benefit," but those 4% credits "do not cease upon reaching any age." Pet. App. 12a n.4. And "as a matter of mathematics," the operation of the 8.5% credits is not affected by the presence of the 4% pay credits. *Id.* While the 4% pay credits add to the amount of a participant's accrued benefit, they have no mathematical impact on the 8.5% restorative credits and do not alter the function of the 8.5% credits. With or without the 4% pay credits, the 8.5% credits have zero effect on the amount of a participant's accrued benefit. *Id.* (presenting hypothetical example to account for 4% pay credits).

REASONS FOR DENYING THE PETITION

The petition presents nothing more than a fact-bound expression of disagreement with the Seventh Circuit (and the district court that ruled the same way). Petitioners' misconstruction of the particular circumstances of Old Monsanto's conversion to a cash balance plan and the operation of the Prior Plan Account is unworthy of review. The Seventh Circuit's ruling creates no split of authority because, contrary to petitioners' assertion, no court has held that a credit to an account is a "benefit accrual" within the meaning of ERISA where the credit has no effect on a participant's previously accrued benefit. The Seventh Circuit's rejection of petitioners' effort to characterize the 8.5% credits on the Prior Plan Accounts as something other than the restoration of an early retirement discount was both correct and consistent with all case law and regulations. This case presents no issue of continuing significance given the unique conversion methodology that produced this plan provision. A dispute over how to characterize the credits to a particular account in the particular plan at issue in this case hardly warrants a writ of certiorari. The petition should be denied.

1. *There is no split of authority.* As petitioners acknowledge, the Seventh Circuit held that the 8.5% credits at issue in this case "were not part of the participant's 'benefit accrual' because they had 'no impact on the accrued benefit at normal retirement age' or 'effect on an employee's rate of benefit accrual.'" Pet. 10 (quoting Pet. App. 15a). The Seventh Circuit recognized that a nominal addition to a participant's hypothetical account (such as the 8.5% credit at issue here) is not a "benefit accrual" if the accrued benefit that the participant had already earned is left unchanged by the credit. Petitioners assert, however, that four courts of appeal have held that the effect of a credit on the participant's accrued benefit is irrelevant. According to petitioners, those cases have "broadly construed benefit accrual as encompassing *everything* credited to a cash balance account." *Id.* at 12 (emphasis added).

Petitioners are wrong. No court has held that a credit to a cash balance account that has no effect on the participants' accrued benefit is a "benefit accrual" within the meaning of ERISA.

Petitioners claim that there is a conflict between the decision in this case and the Seventh Circuit's previous decision in *Cooper* (Pet. 2, 3, 13), even though the Seventh Circuit itself discussed *Cooper* at length in its opinion below and explained that there is no conflict, Pet. App. 8a-10a. The *Cooper* court explained that "benefit accrual" means "the rate at which value is added" to a participant's accrued benefit. 457 F.3d at 639. A credit is a "benefit accrual" only if it is an "addition to the pot," that is, a contribution that increases the amount of the benefit the employee has already earned. *Id.* at 641. In *Cooper*, there was no question that the credits to the account added to the participants' accrued benefit,

and thus constituted "benefit accruals." Because the characterization of the credits as "benefit accruals" was not disputed, the Seventh Circuit's opinion nowhere suggests or even discusses whether the credits would have been "benefit accruals" had they not added to the participants' accrued benefit.[1] No member of the Seventh Circuit voted to rehear this case *en banc* in the face of petitioners' argument that the decision below conflicts with *Cooper*. The Seventh Circuit understood the two cases to be consistent, and they are.

The decisions of the other courts of appeals that petitioners claim conflict with the Seventh Circuit's decision below are, in relevant respects, identical to *Cooper*. All concerned a cash balance plan that, like the one in *Cooper*, guaranteed interest credits through normal retirement age. *Hurlic*, 539 F.3d at 1027; *Register*, 477 F.3d at 60; *Drutis*, 499 F.3d at 613. As discussed above, the interest credits in those cases increased a participant's accrued benefit. Petitioners rip quotations from those decisions completely out of context to argue that they stand for a rule that *any* addition to a participant's hypothetical account balance is a "benefit accrual" even if that addition has no effect on the participant's accrued benefit. *See* Pet. 3-4. These courts have not—and no court anywhere has—adopted such a rule.

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[1] The issue in *Cooper* was whether a plan provision guaranteeing interest credits through normal retirement age discriminated on the basis of age because younger workers would enjoy the benefit of compounding interest over a longer period. The Seventh Circuit rejected the plaintiffs' claim because it treated the time value of money as age discrimination, which is neither required by the statute nor sensible. *Cooper*, 457 F.3d at 638-39.

It is true that the Ninth Circuit, in *Hurlic*, defined "benefit accrual" as "the process by which benefits increase." 539 F.3d at 1037. But the "benefits" that "increased" in that case were the accrued benefits that participants had actually earned, *id.*[2] Likewise, it is true that the Third Circuit in *Register* said that benefit accrual "refers to the credits deposited into the participant's cash balance accounts." 477 F.3d at 68. The interest credits in that case, however, similarly added to the participant's accrued benefit; they were true "inputs" to the account. *Id.* In addition, the Sixth Circuit, in *Drutis*, stated that benefit accrual "refers to the employer's contribution to a plan," 499 F.3d at 614, but again the "contribution" in that case referred to an amount that actually increased the accrued benefit, *id.* at 614-15. None of these courts held or even suggested that "benefit accrual" includes a credit, such as the one in this case, that adds nothing to a participant's accrued benefit, but merely restores the discount taken to provide an early retirement option. The credit in this case does not "increase" the value of the participant's benefits (*Hurlic*), does not "deposit" any value in the participant's hypothetical account (*Register*), and does not "contribute" any value beyond that which the participant has previously earned (*Drutis*).

None of the decisions cited by Petitioners stand for the proposition of law that they try to read into them, *i.e.*, that any credit, regardless of its purpose and function, must be a "benefit accrual." Indeed, none of those courts even considered the kind of credit at

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[2] Likewise, the *dicta* in *Hurlic* cited by Petitioners, explaining that it would "clearly" be age discrimination to reduce or cease "benefits" at a certain age, presupposes that the "benefits" reduced or ceased are the sort of credits that actually add to the participant's accrued benefit. 539 F.3d at 1032.

issue in this case: a credit that functions exclusively to restore a notional discount that facilitated an early retirement option. In contrast, as the Seventh Circuit recognized, the Eighth Circuit's decision in *Atkins* actually involved the restoration of an early retirement discount. And the court in that case, like the courts below, concluded that the reversal of "early retirement discounts" did not reflect additional benefit accruals. *Atkins*, 967 F.2d at 1201.

2. *This case presents no issue of general or continuing significance.* Petitioners concede that the plans' provisions relating to the 8.5% credits are unique, Pet. 8, an argument they emphasized below. Petitioners nevertheless argue that the resolution of this case will somehow have "a profound effect on all employers, sponsors, and employees who participate in benefit plans governed by ERISA." *Id.* at 2. In fact, the true point of contention between the parties concerns how to characterize the 8.5% credits in the isolated context of a conversion methodology coupled with specific enhancements to a benefits package which, according to petitioners, do not exist in any other plan. There is no need for this Court to involve itself in the peculiar circumstances of this case, which has no significance beyond the parties.

Petitioners contend that the critical determination in the Seventh Circuit's ruling concerns whether the 8.5% credits at issue in this case were "additions to the participant's hypothetical account for the plan year" or merely "act to reverse early retirement discounts." Pet. 10. This is not correct. The Seventh Circuit did not examine whether the 8.5% credits were additions to the *account balance*—there was no dispute that they were—but rather whether they were "benefit accruals" that added to the accrued benefit. The Seventh Circuit, like the district court,

fully considered not only the plan language but the explanatory materials provided to participants in advance of the conversion date. It concluded that these credits do nothing more than reverse the 8.5% discounting taken from initial Prior Plan Account balances for those participants under age 55. Pet. App. 14a. Petitioners' baseless disagreement with that reading of the plan language and other documents presents a highly factbound question that does not merit this Court's review.

Petitioners recast their baseless disagreement with the Seventh Circuit when they argue that the 8.5% credits applied to a participant's Prior Plan Account are benefit accruals because if the credits continued until the participant reached age 65, then they would increase the participant's available benefit at retirement. This argument amounts to nothing more than the unremarkable statement that *if* the 8.5% credits did not merely restore the 8.5% early retirement discount, and *if* they in fact were benefit accruals, then they would add to participants' accrued benefits. But, as discussed above, the 8.5% credits merely restore the 8.5% discount and do not add to participants' accrued benefits. This argument is completely untethered to the facts of this case.

Petitioners dig even deeper into the particulars of Old Monsanto's plan when they argue *ipse dixit* that they should have prevailed because it is an "incontrovert[i]ble fact" that the 8.5% credits combined with the 4% pay credits "are necessarily a benefit accrual." Pet. 17-18. Not only are petitioners expressly asking for mere error correction on a matter of "fact," petitioners wrongly treat the fact as uncontroverted, and ignore that the Seventh Circuit expressly demonstrated why petitioners have that fact wrong. As the Seventh Circuit explained,

petitioners' argument here "fails as a matter of mathematics." Pet. App. 12a n.4. Even after factoring in the effect of the 4% pay credits (which do not cease upon reaching any age), the Seventh Circuit explained that the 8.5% credits *never* add to a participant's accrued benefit. Petitioners have not (and cannot) explain mathematically how their argument makes any sense.

Petitioners also assert that the decision conflicts with Treasury Department regulations proposed in 2002. Pet. 13. It is difficult to imagine an argument of less going-forward significance than the interpretation of a *proposed* regulation that the agency never adopted. Moreover, the Seventh Circuit itself considered the proposed regulation and concluded that, had it been adopted, it would have supported the court's view that a benefit accrual occurs only when there is an increase in the participant's accrued benefit. Pet. App. 9a. Petitioners' disagreement with the Seventh Circuit's interpretation of a regulation that was never adopted is no reason for the Court to review this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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